

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue date: 08May2001

Case No.: 2000-LHC-1790

OWCP No.: 07-149176

In the Matter of:

ERNEST J. CORTEZ

Claimant

v.

ADM/GROWMARK

Employer

ADM/ARCHER DANIELS MIDLAND COMPANY

Carrier

APPEARANCES:

Frank A. Bruno, ESQ.

For the Claimant

Jonathan H. Sandoz, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Ernest J. Cortez (Claimant) against

ADM/Growmark (Employer) and ADM/Archer Daniels Midland Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges on April 4, 2000, for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on October 18, 2000, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eleven exhibits while Employer/Carrier proffered thirteen exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from Claimant and Employer/Carrier on February 28, 2001. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That an injury/accident occurred on June 16, 1998.
2. That an employee-employer relationship existed at the time of the accident/injury.
4. That Employer was notified of the accident/injury on June 16, 1998.
5. That Employer filed a Notice of Controversion on November 9, 1999.
6. That Claimant's average weekly wage at the time of injury was \$782.93.

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

7. That benefits were paid from June 20, 1998 to November 7, 1999. Temporary total disability benefits were paid for 16.4 weeks at the rate of \$521.98 per week. Temporary partial disability benefits were paid for 22.4 weeks at the rate of \$157.43 per week. A total of \$12,121.33 in disability benefits were paid to Claimant.²

8. That \$10,941.71 in medical benefits have been paid by Employer/Carrier.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation.
2. Nature and Extent of disability.
3. Medical entitlement.
4. Attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified he is forty-five years old, lives with his wife and they have no children. (Tr. 21-22). He reported having been married previously and there were four children born

² Although Employer/Carrier and Claimant stipulated to the above period of disability compensation, the work records submitted by Employer/Carrier indicate Claimant worked during the following time periods for which he is not entitled to compensation benefits:

September 22, 1998 through December 17, 1998;
December 21, 1998 through March 9, 1999;
March 11, 1999 through August 26, 1999;
August 31, 1999 through September 13, 1999;
September 27, 1999 through October 15, 1999; and
October 19, 1999 through October 21, 1999. (EX-1, pp. 110, 118).

of that marriage. None of those children currently lives with Claimant. He "was on the last semester of ninth grade" when he left J.P. Martin Junior High School and has not earned a GED. (Tr. 22). Claimant confirmed he can read, write and perform mathematical calculations "up to a point." (Tr. 22-23).

Claimant has not attended any trade schools. After leaving the ninth grade, he went to work boiling crabs. Then, he went to either Brown and Root or St. Charles Parish Public Works, however he could not remember where he first worked. Claimant reported he then went to work for Employer. (Tr. 23).

Claimant stated the "six months to a year" he worked for Brown and Root, he was an in-shore roustabout laying pipe and working with welders. (Tr. 23). With St. Charles Parish Public Works, he drove a dump truck and back-hoe. (Tr. 24).

Claimant testified he went to work for Employer "the first month" in 1976. His job title at the time of his June 16, 1998 injury was pellet mill operator. (Tr. 24). He became a pellet mill operator in 1997. (Tr. 82). Barring any "problems," his usual duties involved climbing into the pellet mill, then "pushing buttons" and adjusting valves in the pellet mill. He was also required to descend the pellet mill four to five times a night to check the bins. If a truck arrives, he loaded the truck by pulling on the chains of the pellet mill. (Tr. 83, 85). Claimant reported he also cleaned-out the die and unplug the dust tank. (Tr. 86-88).

Claimant confirmed before the June 16, 1998 accident, he was able to perform his job for Employer without difficulty. His general health before the June 16, 1998 accident was "normal." He acknowledged he had been seeing Dr. Habig, a general practitioner, for "three to four years" for his blood pressure. (Tr. 25).

On cross-examination, Claimant testified he did not remember treatment with a Dr. Ross in 1993 for complaints of numbness and "giving out" in his right leg. (Tr. 147).

Before the June 16, 1998 accident, Claimant was working five to seven days weekly which amounted to 60 to 72 hours, including Sundays if "they needed" him. He stated at the time of the June 1998 accident he "probably could run everything in [Employer's] plant." (Tr. 31, 62). At that time, he was earning "thirteen-

something" per hour. (Tr. 40).

Claimant testified on June 16, 1998, he was having problems with the pellet mill³ jamming. He was taught to put a pry-bar in it to shake the mill loose. Since the mill is hot, Claimant had to wear gloves. As he was pulling on the pry-bar, it slipped and he fell hitting his back on the wall. (Tr. 32). He testified the fall was about five feet, or "from standing height to sitting." He confirmed no one was with him when the accident occurred as he was working alone. (Tr. 33).

When he fell, he called his boss and told him about the incident. He was "pretty sure" his boss at that time was Romero Barrera. (Tr. 32). He does not know if his boss made a report at that time. He testified the accident was between 10:00 p.m. and midnight on June 16, 1998. (Tr. 33, 95).

Claimant reported when he fell, "it stung right away. But within 15 minutes, it started getting a little stiffer." He told his boss he wanted to leave because his back was hurting him, but his boss told him to get the mill running before he left. (Tr. 34). He explained the pain was in his lower back around the belt area. He reported no one administered first aid to him at the time of the accident. (Tr. 35).

After he un-jammed the mill, his boss let him leave early. (Tr. 36). He drove himself home and stated the pain was "real bad" and he "had to stop two or three times to kind of get out of my car and . . . straight up some." (Tr. 96-97). When he woke up the next morning, his back hurt him "really bad." He called Employer and they set up an appointment for Claimant to see Dr. Timothy Finney on June 17, 1998. (Tr. 36).

Dr. Finney ordered x-rays, prescribed medications for Claimant and took him off work. (Tr. 36-37). Claimant confirmed his back was sore and hurting during his examination with Dr. Finney. Dr. Finney put him in work-hardening therapy, which is when his back "started giving [him] really bad problems." (Tr. 37, 98). Dr. Finney released him for light work. (Tr. 38). Claimant reported he "probably" informed Dr.

³ Claimant explained the pellet mill is a die with "big, heavy rollers" in it. It smashes the dust with water and makes pellets. When it jams, "it turns like to . . . really hard rubber. And it locks up." (Tr. 32).

Finney he was receiving medications from another doctor. (Tr. 137).

The light work initially consisted of off-loading trucks, which involved climbing a ten-foot high ladder and pulling the chain to open the gate so that the grain could flow out into the truck. (Tr. 39). Claimant stated his restrictions included 30 pounds lifting, no climbing ladders, no bending, stooping or crawling. (Tr. 43-44, 107). A "couple of months later," he worked in the guard shack and performed sweeping duties. (Tr. 39). In the guard shack, he also calibrated oxygen meters and put work orders into the computer. (Tr. 45). Claimant stated he was earning "thirteen-something" per hour while on light duty. (Tr. 40). He testified "sometimes" he worked over forty hours per week while on light duty. (Tr. 41).

Claimant testified his light duty work off-loading trucks was beyond his doctor's restrictions. He stated the guard shack position was not beyond his doctor's restrictions. (Tr. 45).

Claimant also drove a truck while on light duty for Employer. He observed this position was light duty unless he had to perform lifting duties by himself. (Tr. 45-46).

Claimant last worked for Employer in April or May 2000. (Tr. 46). He decided to stop working when he "went to hit my brakes one day, and I had my children in my truck. And my right leg wouldn't move off the accelerator, and I almost got in an accident." He stated a nerve conduction study ordered by Dr. Burvant confirmed he has nerve damage in his right knee. (Tr. 47, 50).

Claimant testified he eventually contacted Ms. Joyce Ruff and asked her if he could see Dr. Gessner, an orthopedic surgeon in Luling, Louisiana. (Tr. 37). Dr. Gessner told him "to stay basically in bed" and do "nothing." (Tr. 108, 113). Dr. Gessner has still not released him for work. (Tr. 48). Claimant confirmed he informed Dr. Gessner about his pain medication prescriptions and treatment with Drs. Habig and Huff at the same time he was being prescribed medications by Dr. Gessner. He also admitted informing Dr. Huff that he was receiving pain medications from Dr. Gessner. (Tr. 138, 143).

Claimant stated he had recently been examined by Dr. Gessner and has been paying for the treatment and medications himself since November 1999. (Tr. 49). Dr. Gessner has prescribed

Lortab and Soma along with home exercises. (Tr. 50, 100, 114). Claimant testified he complained of numbness in his legs from the first visit with Dr. Gessner. (Tr. 101).

Dr. Gessner ordered a lumbosacral support for Claimant which Claimant wears when he plans "on doing something." Dr. Gessner informed Claimant not to wear the support every day. (Tr. 108).

Claimant could not remember whether he had sustained any work-related low-back injuries before the June 16, 1998 accident. He stated he "may have had a pulled muscle or so . . . there was nothing that never healed within a few days." He further could not recall any low-back injuries off the job. He confirmed he had never sought treatment for any low-back injuries before the June 16, 1998 accident. (Tr. 26). He could not remember having sustained any low-back injuries which kept him from working before the June 16, 1998 accident. (Tr. 27). On cross-examination, Claimant testified he could not remember missing a month-and-a-half of work after a September 9, 1991 work injury to his lower back. (Tr. 147).

Claimant did not have any injuries when he worked for Brown and Root and St. Charles Parish Public works. (Tr. 28-29). He could not recall having received any benefits from workman's compensation claims for low-back injuries before the June 16, 1998 accident. He had claims against Employer for a left arm injury and claims against Employer's predecessor for knee injuries. (Tr. 28).

Claimant reported having been in an automobile accident before his June 1998 work accident which injured his neck and knee, but not his back. (Tr. 29, 130). He missed "a couple of days" of work from that accident. (Tr. 29). Since the work accident, Claimant has continued to perform chores around his house. (Tr. 51). He informed Dr. Gessner about this automobile accident. (Tr. 154).

Claimant confirmed he had been penalized by Employer for missing time. He stated the last time, which was in late 1999 or early 2000, he was "called down" occurred when he was on light duty and was unable to "get out of bed." (Tr. 29). The only other occasion when he was "called down" for absenteeism was in the 1970s because he needed "time off." He confirmed he was never threatened to be fired or let go by Employer. (Tr. 30). When he called in sick, 90% of the time he remained in bed or on the sofa watching television. (Tr. 111).

Claimant confirmed his position involved tending machine 80% of the time, performing minor maintenance and clean-up 10% of the time and driving a dump truck and other equipment 10% of the time. (Tr. 52-53). The job description further involved "standing and walking" 30% of the time which Claimant confirmed as accurate as long as there is no "trouble." He explained if there is "trouble," which is unpredictable, then "you walk all night." (Tr. 55). "Trouble" could be caused by "too much water, bad gauges, humidity or bad dust or stuff like that." (Tr. 56).

Claimant testified he would have to lift 100-pound rollers as part of his regular job. (Tr. 56). The rollers were changed once a month or once every two months and he had assistance of one millwright during the changing. (Tr. 57). He stated he had to climb ladders which were about twelve feet high. (Tr. 59). He explained he would have to stoop about 5 to 10% of the time to check on the pellets to make sure they were running correctly. (Tr. 60-61).

Currently, Claimant can not perform his former job as pellet mill operator because he "couldn't climb that high . . . and keep walking up and down the steps. And I have to take my medicine twice a day or the pain is unreal. And if I take it in the morning, I can't drive to work because it's illegal." (Tr. 62-63). He could not replace a roller at this time because of the stooping which is required. (Tr. 63-64).

Claimant stated he has not been offered any other positions with Employer since he left Employer. (Tr. 65). Claimant met with a vocational rehabilitation counselor for about 30 to 45 minutes. (Tr. 67).

Claimant testified he had seen two of the surveillance videos submitted by Employer/Carrier. (Tr. 67). He stated the video he observed was taken in October 1999 while he was working for Employer. He acknowledged he was videoed draining the oil out of his wife's car. Claimant stated he was not lifting or crawling. He reported he "might have" tightened a few bolts on the car. (Tr. 68). On cross-examination, he acknowledged he was underneath the car in the videotape surveillance. (Tr. 122).

Another video was taken of Claimant moving items out of a garage. Claimant had not seen this video but explained he had

to take the items out of the garage to rent out their house as his family needed the money. He emphasized he had help in moving items, especially a freezer, out of his garage. (Tr. 70-71, 150). He emphasized he never bore the "brunt of the [freezer's] weight." (Tr. 164). Claimant reported after moving these items, he stayed in bed for two days. (Tr. 72).

Claimant reported he "may have" unloaded sheets of plywood by himself from the bed of his truck. He could not remember. (Tr. 124). Claimant later emphasized he did not move any plywood in the October 23, 1999 video. (Tr. 255). He testified he has never had a mustache in his life and the individual in the February 2000 video surveillance was "David" and not him as the individual in that video was wearing a mustache. (Tr. 255-56).

Claimant confirmed he moved out of his house in early 2000 and he moved "nothing heavy" during the move. (Tr. 148-49).

Claimant testified he sleeps three to four hours per night as there is no comfortable position in which he can sleep. His regular days involve laying on the sofa and watching television. (Tr. 73).

Claimant reported Dr. Gessner has ordered an MRI and recommended he go to Tulane Spinal Clinic, but "everything" has been refused. Dr. Gessner has not recommended surgery as he wants to get the results of the MRI. (Tr. 74).

Claimant testified he has fished on occasion. (Tr. 127-28). He confirmed if Dr. Huff reported he had slipped in a boat that would be "completely wrong" as Claimant emphasized he had not been in a boat "since last year." (Tr. 128). He further confirmed he informed Dr. Huff he was receiving pain medications from Dr. Gessner. (Tr. 143).

On further cross-examination, Claimant testified he had been examined by Dr. Habig for problems with his right knee. (Tr. 135). He could not recall if he was examined in August 1998 by Dr. Habig. (Tr. 136). Dr. Habig has prescribed pain medication for Claimant's right knee. (Tr. 135).

Trudy L. Cortez

Mrs. Trudy Cortez testified she has been married to Claimant

for two years. She is a medical technologist in the laboratory at East Jefferson Hospital where she has worked for ten years. She is not a registered nurse. (Tr. 168-69).

Mrs. Cortez noted when she met Claimant, he did not complain of any pain or have any ailments. (Tr. 169). She stated before June 1998, he never complained of back pain. She reported Claimant had shoulder problems from his February 1998 automobile accident. She observed his knee was "a little bruised," but it "was okay" after about a week. She was not aware of any back injuries Claimant may have experienced before January 1998. (Tr. 170).

After Claimant's June 1998 work injury, Mrs. Cortez testified Claimant "had lots of back pain or complained of lots of back pain. He would try to do things around the house while he was off work, and he would usually end up having to stay in bed for several days afterwards. He seemed to improve a little bit . . . six to eight weeks afterwards." (Tr. 171). She reported Claimant complained of pain and numbness in his right leg after June 1998. (Tr. 173). She confirmed Claimant's complaints have "gotten worse" over time as "his right leg tends to go out on him, tends to go numb. I've seen him fall while walking myself. He tries to do things that I physically cannot do for me. And sometimes, he ends up harming himself." She noted Claimant has a problem remembering things and this problem has increased since the job accident. (Tr. 175).

Mrs. Cortez explained during the moving process, which was part of Employer/Carrier's video surveillance, Claimant moved "small boxes . . . clothes, clothes baskets. The things that contained heavy things . . . his uncle would lift." (Tr. 176). She emphasized Claimant at no time attempted to lift the freezer nor did he bear the brunt of the weight of the freezer. (Tr. 177).

Mrs. Cortez confirmed she is "basically supplying the income at this time." (Tr. 178). On cross-examination, she acknowledged she has no knowledge of Claimant's past medical history before January 1998. (Tr. 182).

Ruth Sacra

Ms. Sacra testified she is an office manager with Employer and has held that position for about ten years. Her duties

include maintaining personnel files of the employees of Employer. (Tr. 185).

Ms. Sacra observed Claimant's personnel file contained several documents entitled "Absentee Calendar." She confirmed she personally entered the information onto these documents. (Tr. 186). She testified the 1991 Absentee Calendar showed Claimant missed work from September 28, 1991 through November 11, 1991 because of a worker's compensation injury. (Tr. 188-89).

The 1992 Absentee Calendar indicated Claimant missed work on May 21, July 27 and August 31, 1992 for a worker's compensation injury which was related to his 1991 absences. Ms. Sacra testified she made a notation for herself referencing the 1992 accident as a back injury. (Tr. 190-91). She confirmed it is her custom to annotate in the summary why employees are not at work. (Tr. 196). She testified Employer maintains a "call-in" sheet for explanation of why an employee did not show up to work. (Tr. 203).

Ms. Sacra reported the 1993 Absentee Calendar indicated Claimant missed work on July 12 and November 2, 1993 due to the same back injury. (Tr. 192-93).

Ms. Sacra noted Claimant was on worker's compensation leave from June 17, 1998 through September 18, 1998 due to the June 16, 1998 work accident. (Tr. 195). She testified Claimant was on worker's compensation leave from October 22, 1999 through November 13, 1999 due to a back injury. (Tr. 196-97).

Jerry Cortez

Claimant's uncle, Mr. Jerry Cortez, was deposed post-hearing. He testified Claimant lived next door to him when Claimant lived on Yetta Avenue in Harvey, Louisiana. (CX-11, pp. 5-7).⁴ He watched the surveillance video, dated February 13,

⁴ Even though Jerry Cortez's deposition is marked "CX-10," it is referred to as "CX-11" in the post-hearing briefs. Dr. Ralph Gessner's deposition is also marked "CX-10" and is referred to as "CX-10" in the post-hearing briefs. For purposes of this Decision and Order, Jerry Cortez's deposition testimony will be referred to as "CX-11" and Dr. Gessner's deposition testimony will be referred to as "CX-10."

2000, proffered by Employer/Carrier which depicted a man sweeping and hosing-off a street or sidewalk. He observed the individual filmed in the video was a gentleman who "used to work [in the body and fender shop] across the street." (CX-11, pp. 7-8). He emphasized the individual in the video surveillance was not Claimant. (CX-11, p. 8).

Mr. Cortez testified he knew the individual in the surveillance video was not Claimant as the individual in the video was wearing a mustache and Claimant has never had a mustache. (CX-11, p. 8). Moreover, Claimant has never worked for the body and fender shop on Yetta Avenue. (CX-11, p. 9).

Mr. Cortez knew Claimant had a Mustang which he knows Claimant worked on "a couple of times." (CX-11, pp. 12-13). He helped Claimant move-out around August 2000 and observed Claimant did not move "the heavy stuff." Mr. Cortez and Claimant's son moved "the heavy stuff." (CX-11, pp. 15-16).

Mr. Cortez confirmed he and Claimant's son loaded a freezer onto a truck in October 2000. He did not remember Claimant helping during the loading process. (CX-11, pp. 17-18). He noted Claimant's son went with Claimant to unload the freezer but he never found out who unloaded the freezer. (CX-11, p. 18).

The Video Surveillance

Sherman A. Cravins

Mr. Sherman Cravins testified he is self-employed at Southern Surveillance Company. He confirmed he was hired in early 1999 by Employer/Carrier to "try and observe the activity of [Claimant]." (Tr. 219). He positively identified Claimant at the hearing and confirmed he was able to identify Claimant after being hired by Employer/Carrier. (Tr. 220). He confirmed he did not have a photograph of Claimant before trying to identify him. (Tr. 228).

Mr. Cravins testified he performed the filming about two blocks away from Claimant's house. (Tr. 242). He observed Claimant on the morning of October 23, 1999 performing body repair on "a classic Mustang" at his residence. Mr. Cravins explained he knew this was body work as he watched Claimant remove parts of the grill, the light assembly and the lights.

Claimant was also "kicking the bumper of the truck" and unloaded by himself five to eight sheets of four-by-eight plywood from a truck. (Tr. 221-22). Mr. Cravins explained Claimant kicked the automobile by placing "his buttocks on the ground and . . . kicking the front of the car with . . . the base of . . . his feet." (Tr. 223). Mr. Cravins testified he was not able to videotape Claimant kicking the vehicle or unloading plywood because a truck was obstructing his camera's view. (Tr. 230). Mr. Cravins was positive that the individual moving the plywood was Claimant. (Tr. 233).

Mr. Cravins confirmed he submitted a written report of "everything [he] talked about [during the hearing]." (Tr. 252). The written report of his surveillance on Claimant was included in Dr. Gessner's records. Mr. Cravins did not make any accounts of Claimant unloading plywood or "kicking the front" of a car in his written report. (CX-7, pp. 37-44).

Mr. Cravins testified while Claimant was performing body work, there was an individual present who appeared to offer Claimant "some type of advice," but did not perform any physical repairs to the automobile. (Tr. 223).

Mr. Cravins stated he could not recall the date of the next time he observed Claimant. He reported he did not videotape Claimant's activities on that day. He testified on that date Claimant was performing work with power tools in a workshop in his garage. Mr. Cravins reported the next time he videotaped Claimant was approximately five months after the October 23, 1999 surveillance, in February 2000, when Claimant was working at a shop across the street from his residence. (Tr. 224).

Mr. Cravins emphasized that the February 2000 and October 2000 videotape surveillance display Claimant. He did not film the October 2000 video surveillance. (Tr. 249).

Videotape Surveillance

October 23, 1999

Claimant acknowledged he was filmed in this video surveillance. (Tr. 68). Most of the activity in this video depicts Claimant walking from his garage to a Mustang parked in his driveway. During several minutes of the surveillance, Claimant is seen under the automobile, either on his back, or on

his left side, working with hand tools on the automobile. All other scenes in this video surveillance do not contradict testimony given by Claimant. (EX-7).

February 13, 2000

At the hearing, there was a dispute as to the individual depicted in this surveillance. Claimant contended not he, but rather "David," was filmed in this surveillance. (Tr. 255-56). Whereas Mr. Cravins, who filmed the surveillance, asserted he had filmed Claimant. (Tr. 249). The majority of this surveillance portrays an individual sweeping and hosing-off a street or sidewalk. The image of the individual's face is not clear in the surveillance, but the individual can be identified as wearing a mustache. (EX-11).⁵

October 5 & 7, 2000

The majority of this surveillance shows Claimant walking around the front of a residence and around a pick-up truck loaded with a large freezer. The latter portions of the surveillance show the large freezer having been removed from the truck with Claimant and another gentleman holding-up one side of the freezer while the other side is resting on the ground. There was no indication as to which individual bore the greater weight of the freezer during the unloading process. Once the freezer was unloaded, it was quickly put on wheels and rolled away. All other scenes in this video surveillance do not contradict testimony given by Claimant. (EX-8).

⁵ This videotape is marked "EX-11" and was identified and received into evidence as such at the hearing. Post-hearing, Employer submitted the deposition of Dr. John Burvant and marked it as "EX-11." In Employer/Carrier's post-hearing brief, this videotape is referred to as "EX-9" whereas Claimant refers to the videotape as "EX-11" in his post-hearing brief. Claimant's deposition testimony was identified and received into evidence as "EX-9" at the hearing. Dr. Burvant's deposition testimony is referred to as "EX-12" by Claimant. For purposes of this Decision and Order, the February 13, 2000 video surveillance will be referred to as "EX-11" and Dr. Burvant's deposition testimony will be referred to as "EX-12."

The Medical Evidence

Ralph J. Gessner, M.D.

Dr. Ralph Gessner, a board-eligible orthopaedic surgeon, testified by deposition on December 18, 2000. (CX-10, p. 5).⁶

Dr. Gessner explained "subjective complaints" are "complaints that the patient states regarding pain, discomfort, and . . . you really can't palpate or test for from his history." (CX-10, pp. 5-6). He further explained "objective findings" are those that "physically you can actually identify by yourself. You are not relying on the patient's history." Examples of objective findings are muscle spasm or reflex changes. (CX-10, pp. 6-7).

Dr. Gessner confirmed it is important for a patient to give an accurate and complete history in order to determine the etiology of a back complaint. (CX-10, p. 8).

Dr. Gessner noted he has had patients in his practice who come in to see him with complaints of pain, but no new objective findings, for a refill of their prescription of pain-killers, and then, the patients may go to another doctor and not reveal that they already have a pain-killer prescription in order to receive more medicine. He observed this situation would affect his opinion as to the nature of the problem he is treating with the patient. (CX-10, p. 11). He emphasized he would stop treating a patient if he discovered this were the situation as the patient's behavior would be a breach of the honesty of a doctor-patient relationship. (CX-10, p. 12).

Dr. Gessner first performed a meniscectomy on Claimant in 1977 because of a torn medial meniscus. (CX-10, pp. 8-9, 64). In October 1981, he started treating Claimant for a September 1981 back injury which Claimant sustained at work while lifting an iron cover or hatch. Dr. Gessner treated Claimant "off and on for about two years" as a result of this back injury. (CX-

⁶ See footnote 3, supra, for an explanation regarding the citation of this exhibit.

10, p. 13). He prescribed various pain medications for Claimant during this time. (CX-10, pp. 13-14). He observed Claimant sustained a fractured left forearm on April 15, 1988. (CX-10, pp. 8-9).

Dr. Gessner also treated Claimant for an October 1991 back injury for which he prescribed pain medications. (CX-10, pp. 12, 15, 63). He treated Claimant for this injury until 1993. (CX-10, p. 16). Dr. Gessner testified during the course of his treatment for the 1991 back injury, he took Claimant off of Vicodin and prescribed Darvocet because he "was afraid of [Claimant] becoming addicted to the medicine." (CX-10, pp. 10, 15). He confirmed in his years of practice as an orthopedic surgeon, he has found that "people who have a tendency to become addicted to or crave narcotic pain medication will come in repeatedly with subjective complaints, no new physical findings, in order to obtain more medication." (CX-10, p. 11). Dr. Gessner examined Claimant again in 1997 for a right knee injury and prescribed pain medications for this injury. (CX-10, pp. 8-9).

Claimant was examined by Dr. Gessner on October 26, 1998, for the instant work injury. He noted Claimant reported no intermittent trauma to his back since the 1991 injury. (CX-10, pp. 16, 18). Claimant reported that he had been treating with Dr. Huff, his general practitioner, Dr. Moss and Dr. Altman. (CX-10, pp. 17, 18). Dr. Gessner reported Claimant did not reveal on October 26, 1998 that he was simultaneously treating with Dr. Habig, another orthopedic surgeon. Dr. Gessner diagnosed a strain to the lumbar spine superimposed on degenerative changes. (CX-10, p. 20).

Dr. Gessner observed a November 9, 1998 medical report from Dr. Habig in which Claimant told Dr. Habig that he was not taking any pain medications. Dr. Gessner noted he had prescribed various pain medications to Claimant on October 26, 1998. (CX-10, pp. 21-22). He confirmed this type of information would lead him to terminate the doctor-patient relationship. (CX-10, p. 22).

Dr. Gessner testified Claimant did not reveal that he had been receiving pain medications from Dr. Huff for various back injuries. (CX-10, pp. 18-19). He confirmed this knowledge would have been important in beginning a treatment plan for Claimant. (CX-10, p. 19). He noted Claimant was involved in a motor vehicle accident in February 1998 and left the hospital

"upset due to no real pain meds [being] given." He confirmed this information would be "relevant" in light of Claimant's history with Vicodin and other pain medications. (CX-10, p. 23).

Dr. Gessner opined as an orthopedic surgeon that he does not believe Claimant recognizes he has a problem with pain medications. (CX-10, pp. 20, 64).

Dr. Gessner confirmed an MRI, which predated the October 26, 1998 examination, from East Jefferson Hospital revealed pre-existing degenerative changes in Claimant's lumbar spine. (CX-10, p. 23). He further confirmed the 1991 x-rays documented pre-existing degenerative changes in Claimant's lumbar spine. (CX-10, p. 24).

Dr. Gessner testified Claimant was neurologically intact. (CX-10, p. 25). On physical examination, Claimant had "mild spasm of the lumbar spine." (CX-10, p. 25). He then placed Claimant on light-duty with no lifting over 30 pounds or carrying over 30 pounds, no repetitive bending, stooping, kneeling or crawling. (CX-10, p. 26).

Dr. Gessner confirmed the job description, detailing a pellet mill operator provided by Employer/Carrier, "looks like it fits into what I would call light duty." (CX-10, p. 27).

On cross-examination, Dr. Gessner testified he would not recommend Claimant climb over two floors twice a day and he would not recommend that Claimant pull on a pry bar to unjam a pellet machine. (CX-10, pp. 71-72).

Dr. Gessner examined Claimant on December 21, 1998, for complaints of increased pain. He affirmed that there was no change or findings on physical examination which would document increased pain. He noted there was "mild spasm in the lumbar spine." (CX-10, pp. 27-28). Claimant further complained of pain radiating into his right leg and knee, which Dr. Gessner confirmed was from the earlier 1977 problems. (CX-10, p. 28). On cross-examination, Dr. Gessner further testified Claimant's leg numbness was aggravated by the June 1998 work accident. (CX-10, p. 75).

On January 18, 1999, Dr. Gessner examined Claimant and did not observe any muscle spasm. He noted Claimant "had some tenseness of the muscles of the lumbar spine." Dr. Gessner

testified tenseness is "something within [Claimant's] control." (CX-10, p. 29).

Dr. Gessner examined Claimant again on March 15, 1999 for complaints of pain in Claimant's right knee. He confirmed these complaints are not related to the June 1998 incident. With respect to Claimant's lumbar spine, Dr. Gessner found "he just had some mild spasm and the motion in the back was complete and no abnormal neurological findings." (CX-10, p. 30). He kept Claimant on light-duty and re-filled his pain medicine prescription. (CX-10, p. 31).

Dr. Gessner affirmed he was not aware that Claimant had his pain medication re-filled by Dr. Huff on March 29, 1999. He further confirmed this information would affect the doctor-patient relationship with Claimant. (CX-10, p. 32).

On April 12, 1999, Claimant was examined by Dr. Gessner who again prescribed pain medications to Claimant without knowledge that Claimant had seen Dr. Huff and received pain medication prescriptions. (CX-10, p. 34).

Dr. Gessner examined Claimant on May 10, 1999 for complaints of exacerbation of his pain due to Claimant's duties which required lifting, repetitive bending, stooping, kneeling and crawling. (CX-10, pp. 35-36).

Dr. Gessner observed Claimant was examined by Dr. Burvant on June 30, 1999, and Claimant denied any prior history of back troubles to Dr. Burvant. He further observed Dr. Burvant reported Claimant's job duties as watching machinery and "on rare occasion having to do repair and maintenance work on it." Dr. Gessner confirmed Claimant's history to Dr. Burvant was not true. (CX-10, pp. 37-38).

On August 30, 1999, Dr. Gessner examined Claimant and reviewed an EMG nerve conduction study ordered by Dr. Burvant. The EMG revealed Claimant "had a bilateral S1 radiculopathy, which is consistent with his arthritic condition." He prescribed pain killers again for Claimant. (CX-10, p. 40). Dr. Gessner confirmed he is aware that Claimant had visited Dr. Huff on August 20, 1999 for complaints of a back injury sustained at home on August 17, 1999. (CX-10, p. 41).

Dr. Gessner examined Claimant on September 15, 1999, for "marked exacerbation of pain and discomfort." (CX-10, pp. 42-

43). He noted Claimant missed two days of work. He was not aware Claimant had visited Dr. Huff on September 13, 1999, and had re-filled his pain medication prescription. (CX-10, p. 43). Dr. Gessner observed Claimant had muscle spasm on September 15, 1999. (CX-10, p. 44).

On October 25, 1999, Claimant was examined by Dr. Gessner and associated his complaints with his job. (CX-10, pp. 45-46). He was unaware that Claimant had been examined by Dr. Huff on October 20, 1999, and had his pain medication re-filled. (CX-10, p. 46). Dr. Gessner confirmed he took Claimant off work for one month. (CX-10, p. 49).

Dr. Gessner viewed the October 23, 1999 surveillance video of Claimant working on his wife's Mustang. (CX-10, p. 46). He confirmed Claimant's physical activities on the video are inconsistent with the complaints he presented on October 25, 1999. (CX-10, p. 47). On cross-examination, Dr. Gessner testified Claimant was not performing any activities in the video beyond the restrictions he placed on Claimant. (CX-10, p. 79).

Dr. Gessner examined Claimant on January 17, 2000, for exacerbations of pain with increased activities and prescribed pain medications to Claimant. (CX-10, p. 50). He testified he was not aware Claimant had hurt himself at home on January 28, 2000, and went to see Dr. Huff on January 31, 2000, with complaints of back pain. (CX-10, pp. 50-51).

On February 14, 2000, Dr. Gessner examined Claimant. He affirmed he was not aware Claimant had been prescribed Xanax, an anti-anxiety medication, by Dr. Huff. Dr. Gessner re-filled Claimant's pain medication. (CX-10, p. 52).

Dr. Gessner acknowledged he had viewed the February 13, 2000 surveillance video proffered by Employer/Carrier but was unable to identify the person in the video. (CX-10, p. 80).

On a March 13, 2000 examination, Dr. Gessner confirmed Claimant did not reveal that he had visited Dr. Huff on March 3, 2000, nor did Claimant reveal the medications Dr. Huff had prescribed for him. (CX-10, p. 52). He again re-filled Claimant's pain medication. (CX-10, p. 53).

Claimant went to see Dr. Gessner on March 23, 2000 for "a marked increase in low back pain and leg pain." Dr. Gessner

prescribed a stronger pain medication for Claimant at this time. (CX-10, p. 54).

On April 12, 2000, Dr. Gessner testified Claimant told him "it's necessary for [Claimant] to miss one week of work" because of "exacerbation of pain." Claimant did not reveal to Dr. Gessner he had been examined by Dr. Huff on March 31, 2000 and had received more pain medications. Dr. Gessner again re-filled Claimant's pain medication. (CX-10, p. 56).

Claimant was admitted to St. Charles Parish Hospital Emergency Room on April 13, 2000, for his back pain. He was told not to return to work and was referred to Dr. Gessner. He was given a pain medication prescription. (CX-9, p. 3).

Claimant was examined by Dr. Gessner on May 15, 2000. (CX-10, p. 56). Claimant reported "he was getting out of bed last week and his legs gave way and he fell down causing abrasions over both knees." Dr. Gessner found no spasm during this examination. He was not aware Claimant had been examined by Dr. Huff on May 5, 2000, nor was he aware Claimant had been prescribed pain medications at that time. (CX-10, p. 57).

On June 12, 2000, Dr. Gessner examined Claimant and discovered he was not working. He did not know Claimant had seen Dr. Huff on June 2, 2000, for injuries related to an injury he sustained from a fall in a boat. He was not aware Claimant had been prescribed pain medications by Dr. Huff. (CX-10, p. 58). Apparently, because he did not know of Claimant's breach of the patient/physician relationship until his deposition, Dr. Gessner took no action to terminate his treatment of Claimant.

Dr. Gessner confirmed there was physically nothing new with Claimant on an October 4, 2000 examination. (CX-10, p. 60). Again, Dr. Gessner re-filled Claimant's pain medication prescription. (CX-10, p. 61).

On November 1, 2000, Dr. Gessner examined Claimant and referred him to Dr. Tom Whitecloud at the Tulane Spine Clinic for an MRI. (CX-10, p. 61). He again prescribed pain medications to Claimant. (CX-10, p. 85). Dr. Gessner confirmed he had seen the October 2000 surveillance video and observed Claimant's activities, specifically moving the freezer, were inconsistent with his complaints. (CX-10, pp. 61-62, 82-83). Based on the medical records, Claimant's presentations to his doctors, and the surveillance video of October 2000, Dr. Gessner

opined to a reasonable degree of medical probability that Claimant could return to his regular job without restrictions and he does not need pain medication. (CX-10, pp. 62-63).

On cross-examination, Dr. Gessner observed Claimant's other doctors found spasm on most examinations. He acknowledged it is not probable for a person to feign a spasm on every examination. (CX-10, pp. 69-70). He noted Claimant's complaints have been consistent since the June 1998 accident and acknowledged Claimant's June 1998 work accident aggravated Claimant's condition considerably. He opined Claimant is "in need of some further diagnostic treatment." (CX-10, pp. 75-76, 88, 93). He testified based on what was brought to his attention during the deposition regarding Claimant's medical history, Claimant has "a problem" and he would not "continue giving him medication." (CX-10, p. 76).

Dr. Gessner testified he has not been approached by a vocational counselor to discuss available jobs for Claimant. (CX-10, p. 77). He recommends Claimant have an MRI performed because he is not improving and the disc area which is damaged may be worsening. (CX-10, p. 84). He could not state to a reasonable degree of medical probability that Claimant's spine condition is related to his work accident. (CX-10, pp. 88-89).

J. Lee Moss, M.D.

On October 1, 1991, Dr. Moss initially examined Claimant at the request of Crawford and Company for injuries to his lower back sustained at work on September 28, 1991. Claimant denied any prior pain or injury to his lower back. He complained of a "burning sensation" in his lower back and an episode of right leg numbness. On physical examination, Claimant had decreased motion in his lumbar spine with pain. He opined Claimant had a lumbosacral strain which should resolve within the next few weeks. (EX-10, p. 1).

In a June 29, 1992 letter to Crawford and Company, Dr. Moss reported he examined Claimant on June 9, 1992. Dr. Moss noted Claimant had been working but had spasms in his back. He observed Claimant had full range of motion of his lower back and some pain with extension of his lumbar spine. He reported "there may be some mild spasm present." Dr. Moss recommended lower back exercises and anti-inflammatory medications. He

stated "I certainly don't see any reason why [Claimant] should not be working." (EX-10, p. 3).

A July 7, 1992 medical note stated Claimant was working and taking pain medications. Claimant was "still a little stiff in his lumbar spine." Dr. Moss opined "it is beneficial for [Claimant] to continue to work." (EX-10, p. 5). An August 18, 1992 medical note stated Claimant was having more pain in his lower back. Dr. Moss re-filled Claimant's pain prescription and opined Claimant should be able to work. He recommended Claimant continue his stretching exercises. (EX-10, p. 6).

A September 29, 1992 medical note observed Claimant had been working "a good bit." Claimant reported his right leg goes numb occasionally. Dr. Moss noted Claimant will eventually need an MRI of his lumbar spine. He re-filled Claimant's prescription of pain medication and recommended Claimant continue working. He added "[Claimant] is not abusing the medication, but I would like to see him back in six weeks." (EX-10, p. 7).

On November 10, 1992, Dr. Moss reported Claimant's legs "fall asleep" occasionally with a pain across his back. He noted Claimant continued to have numbness in his right leg. (EX-10, p. 8). Dr. Moss reported on December 22, 1992, Claimant "had to miss some days of work due to increasing pain." He re-filled Claimant's pain medication. (EX-10, p. 9). Dr. Moss noted Claimant did not appear for his January 19, 1993 scheduled appointment. (EX-10, p. 10).

Claimant reported to Dr. Moss on January 26, 1993, that his pain was decreasing and "his leg only falls asleep once in a while." Claimant complained of lower back stiffness. Dr. Moss decreased the pain medication to Claimant. (EX-10, p. 11). A March 9, 1993 medical note indicates Claimant's leg has "stopped falling asleep." Claimant still presented with muscles spasms in his back. Dr. Moss re-filled Claimant's pain medication. (EX-10, p. 12).

On April 20, 1993, Claimant presented with "lower back pain when he does anything." Dr. Moss re-filled Claimant's pain medication. When Claimant was examined again on June 1, 1993, he was "working and doing very well." He complained of back soreness when he is active. Claimant had a full range of motion and was neurologically intact. Dr. Moss re-filled Claimant's medications. (EX-10, p. 13).

Claimant was examined on July 13, 1993, and complained he was "stiff" and "his pain was worse last night." Claimant did not appear for his August 24, 1993 appointment. (EX-10, p. 14).

Matthew Huff, M.D.

The hand-written notes of Dr. Matthew Huff were proffered by Employer/Carrier. He examined Claimant on several occasions between June 19, 1995 and August 28, 2000. On June 30, 1995, Dr. Huff noted Claimant stated he was working long manual hours at work and at home. On August 11, 1995, he reported Claimant re-injured his back on August 7, 1995, picking up a stone. On physical examination, Claimant had moderate spasm in his lumbar muscles. A September 8, 1995 note indicated Claimant re-hurt his back. Claimant was also advised he would not be prescribed more Vicodin. On November 14, 1995, Dr. Huff observed Claimant fell from a ladder on November 13, 1995, and x-rays confirmed he fractured a rib. Dr. Huff noted Claimant did "not desire to be seen by an orthopedic surgeon." (EX-4, p. 1).

On November 29, 1996, Claimant presented with complaints of a sore lower back which was "made worse sitting too long or bending over." Dr. Huff observed moderate muscle spasm in his lumbar region. Dr. Huff noted Claimant re-hurt his back one-and-a-half weeks prior to his May 23, 1997 examination. (EX-4, p. 2). A March 23, 1999 note indicated Claimant re-hurt his right lower back muscles. On April 5, 1999, Claimant had moderate spasm and soreness in his right paravertebral muscles. Dr. Huff reported Claimant had a "basically sitting down job" and "doesn't do anything at home." Claimant reported to Dr. Huff on April 19, 1999 that his "lower back muscles will have reoccurring spasms - when this happens he lays down." Dr. Huff reported Claimant "runs a pellet mill" which he "can do sitting." (EX-4, p. 3).

Claimant re-hurt his left "s. erecti muscle" picking up a child on June 14, 1999. On August 20, 1999, Claimant reported to Dr. Huff he had injured his left superior trapezius muscle and left rhomboid muscles while working at home. On September 13, 1999, Dr. Huff noted Claimant "still hurt in upper back." (EX-4, p. 4) (emphasis added).

An October 20, 1999 note indicates Claimant injured his right upper back muscles. (EX-4, p. 5). On January 7, 2000, Claimant presented with sore right rhomboid muscles. On January

31, 2000, Claimant stated when he bent over two days earlier to pick-up a hammer, he could not straighten-up for several hours. On physical examination, Claimant had spasm and soreness in his left lumbar paravertebral muscles. Dr. Huff noted Claimant had spasm on March 3, 2000. (EX-4, p. 6).

On June 2, 2000, Dr. Huff reported Claimant "recently slipped in boat" and had sore muscles in his right upper back near his right shoulder. On July 24, 2000, Dr. Huff noted Claimant had spasms of neck muscles. (EX-4, p. 7).

Terry L. Habig, M.D.

Dr. Terry Habig, a board-certified orthopedic surgeon, initially examined Claimant on March 4, 1998, for complaints of pain in his left shoulder and right knee. Claimant disclosed he had been involved in a motor vehicle accident on February 18, 1998. He stated x-rays were negative and his main problem from the accident was pain in his left shoulder blade area, left shoulder and left side of his neck. Claimant reported he worked twelve-hour days at a grain elevator and he tends to get soreness in his right knee at the end of the day. Dr. Habig diagnosed Claimant with a cervical strain and chondromalacia of the patella. He prescribed pain medication for Claimant. (EX-5, p. 2).

On March 25, 1998, Claimant was examined by Dr. Habig for complaints of neck and arm pain. Dr. Habig ordered an MRI and opined Claimant had a cervical strain with radicular symptoms. (EX-5, p. 3). On April 9, 1998, an MRI was performed at East Jefferson Hospital on Claimant's cervical spine. Dr. Tupler concluded "ossification of the posterior longitudinal ligament C3-C4 through C6-C7, resulting in narrowing of dimensions of the spinal canal with mass effect upon the cord, C4-C5 and C5-C6 primarily, consistent with moderately severe spinal stenosis at these levels. CT myelogram could confirm. No focal herniation of disc material." (EX-5, p. 7).

Dr. Habig examined Claimant on April 15, 1998, for complaints of continued neck pain, numbness in his arms and headaches. Dr. Habig recommended he see a neurologist and prescribed medication to control his headaches. (EX-5, p. 4). Claimant was examined by Dr. Habig on August 26, 1998, for complaints of right shoulder pain and right arm numbness and pain. Dr. Habig opined Claimant has "possible nerve impingement

secondary to stenosis and spurring of the cervical spine." He noted concern about Claimant's request for pain medication and cautioned Claimant about taking too much. (EX-5, p. 5).

A November 9, 1998 medical report from Dr. Habig indicated Claimant presented with right arm numbness. He reported to Dr. Habig that he was not taking any medications and Dr. Habig discovered no spasm in Claimant's neck. Dr. Habig opined Claimant had cervical spinal stenosis. (EX-5, p. 6).

Stewart E. Altman, M.D.

Dr. Stewart Altman, a board-certified general surgeon, in a letter to Mr. Alfred C. Barrera, an attorney, dated April 6, 1998, reported Claimant had been examined on February 26, 1998, by Dr. Myles K. Gaupp. Claimant presented with injuries to his left arm, left shoulder and right knee as a result of a February 18, 1998 motor vehicle accident. Dr. Gaupp opined Claimant sustained a contusion of the right knee and left shoulder. He prescribed pain medications to Claimant and conservative home therapy. (EX-6, pp. 2-3, 10).

Timothy P. Finney, M.D.

Dr. Timothy Finney, a board-certified orthopedic surgeon, initially examined Claimant on June 17, 1998, at the request of Employer/Carrier. Claimant presented with a chief complaint of "lower back" as a result of a fall at work the preceding night, June 16, 1998. Claimant denied "any past history of significant back problems." He noted Claimant has a history of knee problems. On physical exam, Claimant had tenderness over the lower lumbar spine paraspinal muscles with mild spasm. (EX-2, p. 1; CX-6, p. 1). Dr. Finney opined Claimant had "evidence of lumbar spine strain and spasm." He recommended back stretching exercises for Claimant and prescribed pain medications. (EX-2, p. 2; CX-6, p. 2). He took Claimant off of regular work. (EX-2, p. 3; CX-6, p. 3).

On June 24, 1998, Dr. Finney examined Claimant in follow-up for lower back complaints. He opined Claimant sustained a lumbar spine strain and spasm. He noted mild hamstring tightness and mild tenderness and spasm over the lower lumbar muscles. He recommended a formal course of physical therapy for Claimant and prescribed pain medications. (EX-2, p. 4; CX-6, p.

4). He took Claimant off of work for three more weeks. (EX-2, p. 5; CX-6, p. 5).

Dr. Finney examined Claimant on June 29, 1998, for a follow-up of Claimant's lower back complaints. Claimant reported the therapy made him "feel worse." Dr. Finney observed Claimant had mild spasm over the lower lumbar spine paraspinous muscles. He recommended Claimant undergo an MRI to rule out disc pathology and took Claimant off of work until an MRI was performed. (EX-2, p. 6; CX-6, p. 6).

An MRI of Claimant's lumbar spine was performed at East Jefferson General Hospital on August 10, 1998. Claimant was examined by Dr. Finney on August 21, 1998. He presented with lower back pain with obvious spasm, but "seems to symptoms exaggerate slightly." Dr. Finney interpreted Claimant's MRI to show "multilevel degenerative disc disease in the lumbar spine but no herniated nucleus pulposus." He recommended three weeks of formal physical therapy for Claimant and was "hopeful he will be able to return to some modified duty." (EX-2, p. 10; CX-6, p. 10).

Dr. Finney examined Claimant again on September 21, 1998. Claimant reported that physical therapy had "helped quite a bit" and felt he was ready to return to modified duty. Dr. Finney observed mild tenderness over the lower lumbar spine with minimal spasm present. Dr. Finney released Claimant for modified duty beginning September 22, 1998, and prescribed muscle relaxants to Claimant. (EX-2, p. 13; CX-6, p. 13).

On October 14, 1998, Claimant was examined by Dr. Finney, as a follow-up of his lower back pain. Claimant reported occasional flare-ups of lower back pain, but has continued to work. He denied any radiation of pain into his lower extremities. Dr. Finney noted tenderness over the lower lumbar spine paraspinous muscles with mild spasm present. He opined Claimant had a lumbar spine strain and chronic spasm. He prescribed muscle relaxants and pain medication to Claimant and recommended continued physical therapy and modified duty for Claimant. He restricted Claimant from any heavy lifting or repetitive squatting or bending. (EX-2, p. 14; CX-6, p. 14). Claimant's work guidelines restricted him from lifting, pushing/pulling "to 20 pounds," no twisting/bending/stooping/kneeling and no ladder climbing. (EX-2, p. 15; CX-6, p. 15).

The Health Center for Fitness and Rehabilitation

Claimant was first seen at the Health Center for physical therapy at the request of Dr. Finney on July 1, 1998. (CX-8, pp. 1-3). A progress note, dated July 20, 1998, indicated Claimant still had lower back pain, which was described as "a dull ache, intermittent but aggravated by prolonged standing and sitting." (CX-8, p. 4). Treatment consisted of an exercise program for stretching and strengthening, ice, ultrasound and home therapy. Mr. Fitzgibbon, a physical therapist, reported little progress was being made with physical therapy. (CX-8, p. 5).

Claimant returned on August 24, 1998, to the Health Center and reported he had not carried out any form of exercise since July 24, 1998. Mr. Fitzgibbon observed palpation over Claimant's lumbar spine elicited pain. (CX-8, pp. 7-8).

A September 14, 1998 progress note indicated Claimant had resumed exercise at home, particularly riding his bicycle approximately three blocks daily. Claimant continued to complain of pain. Ms. Claire Rogers, a physical therapist, indicated Claimant's physical therapy regimen was complete. (CX-8, pp. 9-10).

On December 15, 1998, Claimant was discharged from physical therapy at the Health Center. Claimant reported he was able to move "a little better" but his pain was "not improving with physical therapy." (CX-8, p. 11).

John G. Burvant, M.D.

Dr. John Burvant, a board-certified orthopedic surgeon, testified by deposition on December 11, 2000. He examined Claimant on May 28, 1999 and April 4, 2000, on a referral from Employer/Carrier's workers' compensation manager. (EX-12, pp. 5, 31).⁷ From those examinations, he opined Claimant had "a lumbar degenerative disc and a lumbar strain." He reported making a diagnosis of a lumbar strain superimposed upon a degenerative condition usually requires some degree of trauma which then "makes the back become painful without evidence of any type of herniation." (EX-12, p. 5).

⁷ See footnote 4, supra at page 12, for explanation regarding the citation of this exhibit.

Dr. Burvant reported at the first examination, Claimant appeared "uncomfortable" and had difficulty walking on his heels or toes because of his back pain. Dr. Burvant observed some spasm of the right paraspinal muscles along with tenderness in that area. (EX-12, pp. 6, 36). Dr. Burvant explained "uncomfortable" referred to Claimant appearing to be in pain during most of the examination. (CX-12, p. 7).

Claimant denied any prior back difficulty or treatment before June 1998 to Dr. Burvant. He further denied any radiation of pain into his right leg. Because Claimant reported he felt unsafe about climbing stairs and because he reported his right leg had given out on him, Dr. Burvant restricted Claimant from any stair or ladder climbing. (EX-12, p. 9). He further restricted Claimant from any lifting over 50 pounds. (EX-12, p. 10). Dr. Burvant recommended an EMG and NCS be performed. (EX-12, p. 15).

Dr. Burvant testified Claimant reported pain radiating down into his lower extremities at the April 4, 2000 examination. (EX-12, p. 12). He observed Claimant appeared very "uncomfortable in his movements." Claimant stated he was unable to safely lift more than 25 pounds and still had concerns about climbing stairs or ladders as his leg continued to give out. (EX-12, pp. 13-15).

Dr. Burvant noted Claimant had an EMG nerve conduction study performed in August 1999. He observed the EMG showed "a bilateral S-1 radiculopathy, right greater than left which would indicate some nerve root involvement." (EX-12, p. 16). Based upon the degenerative changes he saw in the MRI, he confirmed a finding of bilateral S-1 radiculopathy is consistent with an arthritic spine. He stated Claimant should have been able to return to work full-time with lifting restrictions of 50 pounds. (EX-12, p. 17). He would currently place a restriction of no climbing ladders on Claimant. (EX-12, p. 18).

Dr. Burvant consistently testified Claimant did not relate to him any problems associated with bending, stooping, crawling, kneeling, pushing or pulling. (EX-12, pp. 11, 14, 19).

Dr. Burvant reviewed the job description of a pellet mill operator provided by Crawford and Company and stated the only problem he saw with respect to Claimant's restrictions was the ladder-climbing which is related to his right leg weakness and not his work injury. (EX-12, pp. 19-20, 28). He confirmed

Claimant should be able to perform the job delineated in the description if there is no ladder-climbing involved. (EX-12, pp. 20-21).

Dr. Buvrant testified the only association he could make between Claimant's complaints and the work-related injury of June 1998 was based on Claimant's "telling me that it started at that time, he had never had it before, and it had never gone away since then." He noted that if Claimant were having back problems before the June 1998 accident, then it would call into question whether Claimant's complaints were associated with the June 1998 accident. (EX-12, pp. 21-22).

Dr. Burvant confirmed Claimant had informed him of a prior right knee surgery. He was not aware of Claimant's 1991 work-related back injury. (EX-12, p. 22). He was unaware of the time from 1991 through 1993 that Claimant missed from work as a result of this injury. (EX-12, p. 23). He was not aware Claimant had treated with Dr. Moss during that time for the September 1991 back injury. (EX-12, pp. 23-24). He was also unaware that Claimant had re-injured his back on August 7, 1995, and had treated with Dr. Huff for that injury. (EX-12, p. 24). He was not aware that Claimant re-injured his back on several occasions thereafter and had been prescribed pain medications for these back injuries. (EX-12, pp. 24-25). He did not believe Claimant had ever asked him to prescribe pain medications. (EX-12, p. 26).

Dr. Burvant testified Claimant did not report a February 18, 1998 motor vehicle accident to him. He was not aware Claimant complained of right knee pain after the accident. He was also unaware Claimant treated with Dr. Habig for right knee complaints. (EX-12, p. 26). Symptoms from his right knee injury could cause his "leg to give out" according to Dr. Burvant. (EX-12, p. 27).

After considering Claimant's prior medical history, Dr. Burvant opined he would relate Claimant's complaints after the June 1998 work accident to that injury. He would not relate the radiculopathy of the right leg to the June 1998 work accident but rather to his chronic back problems because it did not "come up in close association" with the work injury. (EX-12, p. 27). He confirmed Claimant's complaints are part of an ongoing degenerative change problem in his spine, and he would expect on-going back problems, complaints of lower back pain and spasm since 1995. (EX-12, pp. 30-31).

Dr. Burvant opined that the extent of Claimant's degenerative disc disease is very common without any significant kind of labor. (EX-12, pp. 34-35). He believed that Claimant had a pre-existing degenerative condition that was aggravated by his work injury. (EX-12, p. 35). He further opined the degenerative condition was permanent but the aggravation is not permanent. (EX-12, p. 37). Dr. Burvant did not deem another MRI necessary since Claimant has had two MRIs and his injury occurred in June 1998. (EX-12, p. 45). He had no objection to Claimant continuing conservative treatment, including medications. Id. He opined he would place no restrictions on Claimant based solely upon his degenerative changes. (EX-12, p. 46).

Dr. Burvant testified he expected it "would be difficult for" Claimant to climb back onto his feet from a laying position on a hard, flat surface given his reported symptoms. He further reported it would be "painful" for Claimant to get under and get up from underneath a car to do repairs. (EX-12, pp. 28-29). He would expect to see problems with Claimant's movements if "he bent over at the waist to pick something up off the ground." He would expect to see "signs of pain" if Claimant were kneeling, crawling and stooping. (EX-12, p. 29).

Dr. Burvant stated he would not recommend surgery for Claimant as he feels Claimant reached maximum medical improvement on November 2, 1999, with an assigned impairment rating of ten percent. (EX-12, pp. 42, 48).

The Vocational Evidence

Nancy Favaloro

Ms. Nancy Favaloro testified by deposition on December 19, 2000. The parties stipulated as to her expertise in vocational rehabilitation. (EX-13, p. 4). She reported having met with Claimant to conduct a vocational assessment. She reviewed the job description of a mill operator at Employer's business and visited Employer's site to review the job tasks that were set out in the job description. She reviewed the medical information to determine if a mill operator is within Claimant's work restrictions. She then looked at alternate employment in the event Claimant decided not to return to his former job. (EX-13, pp. 4-5).

Ms. Favaloro explained she reviewed the medical reports, including the restrictions placed on Claimant by Drs. Gessner, Burvant, Finney, the Health Center and "some hospital records." (EX-13, pp. 5-6). She observed the physical demands of Claimant's pellet mill operator position are within the restrictions outlined by Dr. Gessner. She noted Dr. Gessner restricted Claimant to no lifting over 30 pounds. She stated Claimant would have the help of laborers if he had to lift over 30 pounds. (EX-13, pp. 7-9). After visiting Employer's workplace and discussing Claimant's job tasks with a foreman, she reported a laborer, and not Claimant, would do any climbing if the dust tank became clogged. (EX-13, p. 11).

Ms. Favaloro confirmed she met with Claimant on October 10, 2000, in order to conduct achievement tests and to determine his transferrable skills and ability. (EX-13, pp. 16-17, 19). She testified, based on this meeting and Claimant's test results, she was able to identify vocational alternatives which were available in October 2000. (EX-13, p. 17).

A December 19, 2000 labor market survey outlined the following positions:

Production Technician for AllFax Specialties in St. Rose, Louisiana. Lifting is less than ten pounds and he can alternatively sit, stand and walk. Wages are \$7.50 per hour with an increase to \$8.00 per hour after 90 days of employment. (EX-13, Exhibit #1, p. 2).

Booth Cashier at New Orleans International Airport. This is a sedentary position with the ability to alternate postural positions. Wages are \$6.15 per hour. (EX-13, Exhibit #1, p. 2).

Unarmed Security Guard position for Guardsmark in the Destrehan, Louisiana area. He is not allowed to apprehend anyone. He will be seated while working and occasionally stand and walk to make rounds. Lifting is under 20 pounds and occasional. Wages are "\$6.50 and up depending upon the post." (EX-13, Exhibit #1, p. 2).

Food Prep Worker for Gate Gourmet at New Orleans International Airport. He wraps sandwiches and places them onto carts. He will stand and walk while working. Lifting is up to 20 pounds and occasional. Wages are \$6.96 per hour. (EX-13, Exhibit #1, p. 2).

Dispatcher for Moon's Wrecker Service in Harahan, Louisiana. He will take information from customers and dispatch tow trucks. This is a sedentary position with wages of \$5.50 per hour. (EX-13, Exhibit #1, p. 2).

Line Server with CA One Services, Inc. at New Orleans International Airport. He will perform basic cooking and warm up foods for customers. He will also take orders. He stands and walks while working and occasionally lifts 20 pounds. Wages are \$6.20 per hour for the first 90 days and, thereafter, increase to \$6.88 per hour. (EX-13, Exhibit #1, pp. 2-3).

The Contentions of the Parties

Claimant contends that he is permanently and totally disabled under the Act as a result of his June 16, 1998 work accident. Claimant further contends he is in need of continuing medical treatment as prescribed by Dr. Gessner.

Employer/Carrier, on the other hand, initially contend that Claimant's credibility is wanting and he has not proven any objective physical impairments rendering him disabled under the Act. Additionally, Employer/Carrier contend Claimant has not proven a causal relation between any physical impairment and his alleged accident of June 16, 1998.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v.

Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Prima Facie Case

Section 20(a) of the Act, 33 U.S.C. Section 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990); Bridier v. Alabama Dry Dock & Shipbuilding Corp., 29 BRBS 84, 89 (1995).

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

In the present matter, Claimant has established sufficient evidence to invoke the Section 20(a) presumption. Claimant injured his lower back in a work-related accident on June 16, 1998, when he fell attempting to un-jam a pellet mill. Though the accident was unwitnessed, Claimant testified he immediately reported the accident to his supervisor. Employer/Carrier failed to introduce any testimony or documentary evidence refuting or disputing Claimant's June 16, 1998 accident. Furthermore, Claimant was examined by Dr. Finney on June 17, 1998, who found objective signs, i.e., spasm in Claimant's lumbar muscles, indicative of a trauma to Claimant's lower back.

Thus, Claimant has established a prima facie case that he suffered an "injury" under the Act on June 16, 1998, and that his working conditions and activities could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence to

the contrary which establishes that a claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991); see also Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 690, 33 BRBS 187, 191 (CRT) (5th Cir. 1999). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co. v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996).

The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, an employer must establish that the claimant's condition was not caused or aggravated by his employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

In this case, Employer/Carrier have not presented facts or substantial countervailing evidence to rebut the presumption that Claimant's employment did not cause, contribute to, or aggravate his condition.

Employer/Carrier initially contend Claimant is incredulous, and therefore, his unwitnessed accident may not have even occurred. The Board has held that an injury occurs within the scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. Compton v. Avondale Industries, Inc., 33 BRBS 174, 176 (1999). In the instant case, Claimant's uncontroverted testimony establishes he injured his lower back when he fell while trying to un-jam a pellet mill with a pry-bar. Claimant testified he immediately informed his supervisor about the accident and Dr. Finney found objective signs of trauma to Claimant's lower back the following day.

Employer/Carrier presented the medical records of Drs. Gessner and Burvant to rebut the Section 20(a) presumption. Employer/Carrier point out Claimant has a history of injuries to his lower back and a history of concealing information from his doctors. However, after considering Claimant's prior medical

history, Dr. Burvant opined he would relate Claimant's complaints after the June 1998 work accident to that injury. He believed that Claimant had a pre-existing degenerative condition which was aggravated by his work injury. Dr. Gessner also opined Claimant's June 1998 work accident aggravated his condition. Since Employer did not establish that Claimant's condition was not caused, in part, or aggravated by his employment, the Section 20(a) presumption still applies. See Rajotte, supra; Bridier, supra at 89-90. Accordingly, the record is devoid of any evidence rebutting Claimant's invocation of the Section 20(a) presumption.

B. Nature and Extent of Disability

The burden of proving the nature and extent of his disability rests with the claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum

medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once a claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant's veracity must be considered in evaluating the issue of nature and extent of his disability.

The Board will not interfere with credibility determinations made by an administrative law judge unless they are "inherently incredible and patently unreasonable." Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); Phillips v. California Stevedore & Ballast Co., 9 BRBS 13 (1978). It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his judgment. Avondale Shipyards, Inc. v. Kennel, supra at 91; Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 945 (5th Cir. 1991); Mendoza v. Marine Personnel Company, Inc., 46 F.3d 498, 500-01 (5th Cir. 1995). The Fifth Circuit, in whose jurisdiction this matter arises, has sustained a credibility determination which was "tenuous, credulous and unwise," but corroborated by substantial evidence in the record. Plaquemines Equip. & Mach. Co. v. Neuman, 460 F.2d 1241, 1242 (5th Cir.), cert. denied, 409 U.S. 914 (1972).

In the instant case, I find Claimant has established that he suffered a disabling injury under the Act which may require continuing medical treatment. However, I further find, for reasons discussed below, his credibility is indeed questionable and he has the physical capacity to perform his former job as of November 2, 1999, and therefore no longer suffers a wage earning loss. See Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992). Generally, I found Claimant's testimony internally and mutually inconsistent when measured by opposing testimony and documentary evidence. Moreover, Claimant's demeanor was unimpressive as he vacillated from one set of facts to another when faced with contradiction.

1. Claimant's lack of candor at the hearing

Employer/Carrier argue that Claimant's credibility should be discounted in light of his equivocal testimony given at the hearing. Employer/Carrier point out that in deposition Claimant concealed his earlier lawsuit filed with respect to his February 1998 motor vehicle accident. On cross-examination, at the hearing, Claimant acknowledged he had filed a lawsuit in connection with this motor vehicle accident which he subsequently lost.

Employer/Carrier further point out Claimant testified at the hearing that his health was "normal" before the June 16, 1998. However, at that time Claimant was treating with Dr. Habig for

complaints related to the February 1998 motor vehicle accident. Moreover, Claimant testified he was treating with Dr. Huff for his blood pressure. The medical evidence indicates Claimant was also treating with Dr. Huff for back symptoms.

Claimant testified he knew of no occasion on which he missed any work due to a lower back injury and denied seeking treatment from Dr. Huff for any lower back injuries. However, Employer/Carrier presented their employee work records which indicated Claimant had missed work on several occasions in the early 1990s due to lower back injuries. Although most of Claimant's complaints to Dr. Huff do not appear to be related to his lower back, Dr. Huff did observe Claimant had some muscle spasm in his back. The foregoing inconsistent testimony offered by Claimant must be considered in assessing his overall credibility and demeanor.

2. Claimant's candor with his doctors

Employer/Carrier emphasize Claimant's lack of credibility is highlighted by his lack of candor with his doctors. The medical evidence of record corroborates Employer/Carrier's assertion that Claimant was not consistent in his histories provided to treating and consulting doctors.

Initially, both Drs. Gessner and Burvant testified they based their opinions regarding diagnosis and work restrictions solely upon the history provided by Claimant and his subjective complaints.

The medical evidence presented in this matter is replete with Claimant's inconsistencies when treating with his physicians. Dr. Gessner consistently testified in his deposition that Claimant had not disclosed his medical examinations and pain medication prescriptions provided by other physicians. To the contrary, Claimant testified he had disclosed his treatment with Drs. Huff and Habig to Dr. Gessner. The medical records of Dr. Gessner, along with his deposition testimony, uniformly contradict Claimant's representations regarding other examinations and pain medication prescriptions.

Claimant also denied any significant back problems prior to the June 1998 work accident to Drs. Finney and Burvant. Dr. Gessner had treated Claimant for back problems until 1993 and Claimant denied any significant back problems to him since 1993.

However, the records of Drs. Huff and Habig indicate Claimant had been treated for complaints associated with his lower back during the period between 1993 and June 1998.

Claimant was also inconsistent in reporting the etiology of his complaints after the June 1998 work accident to his various doctors. Dr. Gessner consistently reported Claimant stated his symptoms were caused by his work. On the other hand, Claimant told Dr. Huff his symptoms were caused by his activities at home. For example, on June 14, 1999, Dr. Huff reported Claimant hurt his left "s. erecti" muscles picking up a child. On August 20, 1999, Dr. Huff noted Claimant hurt his left superior trapezius and rhomboid muscles while working at home. On June 2, 2000, Dr. Huff reported Claimant had sore muscles in his upper back near his right shoulder from slipping in a boat.

At his November 9, 1998 examination with Dr. Habig, Claimant reported he was not taking any medications. However, Claimant had seen Dr. Gessner on October 26, 1998 and had his pain medication prescription re-filled.

In May 2000, Claimant reported to Dr. Gessner that he was terminated from his job. However, Claimant testified at trial that he stopped working in April 2000 due to the pain and nerve problems in his right leg. He further testified he had never been threatened to be fired or let go by Employer.

Dr. Gessner testified, based on the inconsistencies in Claimant's presentation, he would terminate the patient-doctor relationship.

The foregoing inconsistencies offered by Claimant to his physicians detracts from Claimant's credibility.

3. Claimant's candor regarding his job description

Claimant testified he would have to lift 100-pound rollers as part of his regular job. The rollers were changed once a month or once every two months and he had assistance from one millwright during the changing. He stated he had to climb ladders which were about twelve feet high. He explained he would have to stoop about 5 to 10% of the time to check on the pellets to make sure they were running correctly. At the hearing, when Claimant was questioned about the same job description which was submitted to Drs. Gessner and Burvant, he

agreed with the stated requirements, which clearly conflict with his description, and testified he could not perform his former duties as a pellet mill operator because he could not carry out the climbing requirements.

Employer/Carrier presented the deposition testimony of Ms. Favaloro who reported Claimant's job taskings after having visited Employer's workplace and discussed Claimant's job requirements with a foreman. Ms. Favaloro's uncontroverted testimony established that Claimant's position does not require repetitive bending, stopping, kneeling or crawling. Furthermore, Claimant is not required to lift, push or pull anything in excess of 25 pounds. Ms. Favaloro also testified the 100-pound rollers are usually changed during the day and the heavier tasks of Employer's workplace are performed by a "labor pool."

Both Drs. Gessner and Burvant testified the work restrictions they placed on Claimant were based on his description of his job requirements. When Dr. Gessner was informed of Claimant's job taskings as presented by Employer/Carrier, he testified he would not place any work restrictions on Claimant.

Dr. Burvant testified he placed restrictions from any stair or ladder climbing on Claimant because Claimant subjectively reported he felt unsafe about climbing stairs and because he reported his right leg had given out on him. Dr. Burvant consistently testified Claimant did not relate to him any problems associated with bending, stooping, crawling, kneeling, pushing or pulling. Indeed, Claimant testified he stopped working because his right leg continued to give out on him. Dr. Burvant opined Claimant's right leg complaints were unrelated to the June 1998 work accident. Both Drs. Gessner and Burvant testified Claimant could return to his former duty as a pellet mill operator.

The foregoing inconsistent testimony proffered by Claimant regarding his job requirements further discount Claimant's credibility.

4. The Video Surveillance

Claimant also offered inconsistent testimony with regard to his actions in the surveillance video of October 23, 1999.

Claimant reported to Dr. Gessner he had worked on his wife's Mustang which was necessary for her transportation. Claimant testified at trial he did work on his wife's Mustang, but was in "no big hurry" to get the vehicle into shape. He testified the car was not drivable. His wife testified the Mustang neither operates nor runs. Notwithstanding the foregoing, Claimant testified he was changing the oil on October 23, 1999 in the Mustang.

Claimant was observed in the October 23, 1999 surveillance video underneath the Mustang working with hand tools. Drs. Gessner and Burvant, upon viewing the video, testified Claimant's physical activities were inconsistent with his subjective complaints.

Claimant was again observed on October 7, 2000, unloading a freezer from the bed of a pick-up truck. On October 4, 2000, Claimant complained to Dr. Gessner of marked pain in his lower back region. However, in the October 2000 surveillance video, Claimant can be seen, with the assistance of a man and a woman, unloading the freezer. Claimant was then videoed pulling the freezer, which was on wheels, without assistance away from the truck. Dr. Gessner viewed this video and opined Claimant's activities were inconsistent with his complaints made on October 4, 2000.

5. Conclusion

In light of the foregoing, I find the weight of the credible testimonial and medical evidence supports a conclusion that Claimant's testimony is not entirely worthy of belief. His vacillation in testimony diminishes its believability and thus the evidentiary weight to be so accorded. Given the medical opinions of Drs. Gessner and Burvant, I find and conclude that Claimant had the physical capacity to perform the job tasks of his former employment. Any restrictions placed on Claimant were as a result of his misrepresentations about his job requirements or conditioned upon his subjective complaints. Claimant's own testimony establishes that he stopped working due to his right leg complaints. Dr. Burvant opined these complaints are not related to the work accident of June 16, 1998. Therefore, I find and conclude that Claimant reached MMI on November 2, 1999, when Dr. Burvant testified Claimant should have been able to return to his former employment.

C. Medical/Surgical Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for Employer/Carrier to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

In the present matter, since I have found Claimant established a prima facie case of a work injury, Employer/Carrier are liable for Claimant's medical expenses associated with his June 16, 1998 injury. Dr. Gessner testified Claimant is in need of further treatment, but he would not continue prescribing pain medications for Claimant.⁸ Dr. Burvant testified he had no objection to Claimant continuing to undergo conservative treatment, including pain medications. Accordingly, Employer/Carrier is responsible for all reasonable and necessary medical expenses related to Claimant's lower back

⁸ However, Dr. Gessner did not indicate what further treatment is necessary for Claimant. He further testified he would terminate the patient/physician relationship based upon Claimant's concealment of information regarding his other medical treatment and pain medication prescriptions.

condition, including any reasonable and necessary pain management treatment resulting therefrom. However, I find, based on Dr. Burvant's reasoned medical opinion and no cogent reasons advanced by Dr. Gessner, that another MRI is not reasonable or necessary in view of the passage of time since Claimant's work injury and two prior MRIs.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills. . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.⁹ A service sheet showing that

⁹ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the

service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability for the periods from June 17, 1998 to November 2, 1999, when Claimant was not working due to his June 16, 1998 work accident (see footnote number 2), based on Claimant's stipulated average weekly wage of \$782.93, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's June 16, 1998 work injury to his lower back and its residuals, pursuant

administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **April 4, 2000**, the date the matter was referred from the District Director.

to the provisions of Section 7 of the Act. 33 U.S.C. § 907.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 8th day of May 2001, at Metairie, Louisiana.

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LEE J. ROMERO, JR.

Administrative Law Judge